Supreme Court, U.S.
FILED

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No. —

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD ADAMS, et al.

Petitioners,

v.

CITY OF CHICAGO

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604

(312) 427-3200

Attorney for Petitioners

QUESTION PRESENTED

Is a plaintiff in a Title VII case of disparate impact discrimination who seeks to prevail by relying on the "equally valid less discriminatory alternative" standard of *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975) required to do more than make the "meaningful showing of acceptable alternative employment practice," required by the Court of Appeals for the Fifth, Eighth, Ninth and Eleventh Circuits and establish that the less discriminatory alternative has been validated by the same methods that were ultimately employed by the employer?

LIST OF PARTIES

Petitioners are 336 present and former Chicago police officers: Edward Adams, Helen Adams, Peggy L. Adams, John P. Aguinaga, Jerome Albert, Percy Allen, Jr., Valerie L. Allen, Lonnie E. Alston, Gene A. Anderson, Paul D. Anderson, Thomas A. Anderson, Jr., David C. Baez, Lester A. Bailey, John E. Ball, Avis Baker, Regina R. Banahan, Donald K. Banks, Joe N. Barnes, Jr., Centenius D. Billingslea, Charles E. Black, Carol A. Blakely, Walter M. Bland Jr, Richard W. Bolling, Vance Bonner, Robert W. Booker III, Ricky L. Boone, Joseph Bourgoyne, Phillip C. Bowens, Dion Boyd, Clarence Bradley, Clarence Bradley, Cassandra T. Bradshaw, Michael Bradshaw, Dana Brady, Alvin L. Brown, David Brown, James Brown, Jeanetta A. Brown, Raimondo L. Brown, Regina Brown, Thomas M. Brown, Frederick L. Buchanan, Annette Buggs, Gregory E. Callaway, Darlene Capers, Karla M. Chaplin, David A. Cherry, Celestine Clark, Nanida M. Cleveland, Yvette D. Clinkscale, Adlai F. Coleman, Natalie Coleman, Ronald W. Coleman, Mary L. Collins, Tranondus Cook, Michael Cox, Ralph E. Craig, James A. Crawford, Theodore E. Crawford, Jr., Don D. Crayton, Wallace D. Crayton, James A. Crooks, Beatrice V. Cuello, Pamela D. Cureton, Renee A. Daniels, Glenn A. Davis, Michael Davis, Monte Dawson, Inocencio Diaz, Gerald C. Diggs, James N. Doby III, Rose M. Donald, Alfred E. Dotson, Cornelius M. Downey, Jill H. Downey, Ronald E. Dukes Jr., Claude L. Dunlap Jr., Almeda E. Dunn, Valerie K. Elliott, Robert S Ellis, Sandra J. Ervin, Darryl Flenoy, Samuel C. Flex, Charles Fountain, Carol A. Fox, Bridgett V. Frazier, Janelia E. Freeman, Steven Gale,

Roderick L. Gardner, Ollie A. Gavin, Phyllis E. Gibson, Richard Gonzalez, Alberta L. Gordon, Joyce P. Gordon, Rose L. Gordon, Ray A. Gosberry, Marilyn Govan, Denise F. Greene, Mary D. Green, Singleton Green, Tracey L. Green, William T. Green, William D. Greer, Paul S. Gregoire, Phillip Guerrero, Robert C. Hamilton, Patricia E. Hampton, James F. Hardaway, Gloria D. Harden, Melvin Hargrett, Gwendolyn N. Harris, Willie L. Harris, Cassandra D. Hawthorne, Michelle R. Hicks, Denise A. Foster, Herman Hollister, Harry Holmes, Elgin D. Holt, Ronald M. Holt, Milton Hubbard, Charlie E. Hughes, Kim-Toy Huh, JoAnn Hunt, Tim Hunt, Carey D. Irving, Wilma Irvin, Roberto Jackson, Tyrone Judon, Larry D. Jackson, Laura James, Michael A. Jamison, Johnny Jenkins, Dania R. Johnson, Hubert Johnson, Leroy Johnson, Jr., Marcia E. Johnson, Marco M. Johnson, Odessa W. Johnson, Robert J. Johnson, Willie T. Johnson, Edwin L. Jones, Clarence E. Jordan, Robert Jordan, Tyrone R. Jordon, Ruth M. Joyner, Cassandra G Judon, Bernard K. Kelly, Debra A. Kelly, Shawn C. Kennedy, Jacquelyn B. Kimber, Michael A. Lacey, Richard L. Langston Jr., Edward K. Leak Jr., Melvin L. Lesley, Cornelia C. Lott, Howard A. Linsey, Clarence W Longley, Otis Love, Robbie Marks, Kirven Martin Jr., Steven W. Martin, Marshall T. Massey, Errol A. Matthews, Harry M. Mays, Kerry E. May, Janice McArthur, Eddie L. McCann Jr., Cynthia E. McCarroll, Donald M. McCoy Jr., Autry McCoy, Otha U. McCoy II, James McKnight, Chris Meaders, Sheila A Merriweather, Thomas Mills, Vickie M. Minnifield, Lamarr Minor, Barbara A. Mitchell, Victor Morgan Sr., Randall D. Mortimore, Diane L. Murdock-Arnold, Sandy L. Nash, Steven M. Newman, Cynthia Nieves,

Arithelius K. O'Neal, Elaine McKinney, Bishop W. Pamon, Elbert L. Parker, Michael Parker, Richard E. Patrick, Vernon L Payne, Harold W. Peete, Ovetta Peete, Walter J. Perkins, Crystal Pinkson. Rodney A. Kincaid, John J. Porter, Maverick Porter, Louis Portlock, Rita Pritchett, Charles Radcliffe, Charles A. Ramey, Armando G. Ramirez, Ray M. Ramirez, Johnny L. Randle, Landry R. Reeves, Crez Reyes, Leatheia V. Rhodes, Victoria Richards, Victor Rivera, Laurence Robinson, Daisy E. Rochon-Johnson, Valerie Rodgers, Azzie Roland Jr., Melvin Roland, Danny Roseman, Geno Rouse, Mikie E. Samuel, Roy Sanders, Johnnie W. Seward Jr, Felicia A. Shallow, Willis W. Shannon, Darrell W. Shaw, Sherida J. Shepherd, Elizabeth Shinn, Mario O. Silva, Beverly Joy Simmons, Ray E. Simmons, Austin L Sims, Donald L. Smith, Milton H. Smith, Necole W. Smith, Ollie B. Smith Jr., Robert E. Smith, Wayne J. Smith, Willie J. Smith, Lawrence Sneed, Jr., Jabulani C. Spraggins, Jeanette Sprewer, Ernest T. Staggers, Adrienne L. Stanley, Pamela Word Stanley, Barbara J. Stewart, Nelson L. Stewart, Larry Strong Sr, Flora E. Suttle, Giselle Taylor, Alfred M Thomas Jr, Sherman G. Tidwell, James Toliver, Wanda Torres, Diana C. Townsend, Phyllis Townsend, Patricia C. Travis, Randy D. Troche, Lazane B. Tyler, Sharon D. Tyler, Michelle L. Tyse, Caroll A. Vaughn, Robert D. Vicks, David A. Villalobos, Red L. Waller, Keith Walthall, Michael Ward, Commletha Washington, Doris Washington, Toni M. Washington, Andre L. Watkins, Jocelyn Watkins, Marie A. Watkins, Anthony Watson, Florence Watson, Stephen A. Watts, Kenneth M. Webb, Sr, Fred Wheat, Thomas Wheeler, Jr., Hardy D. White, Jewel V. White, Clarence Williams Jr, DiEthel Williams, Keith Alan

Williams, Regina M. Williams, Teddy Williams, Maurice Willis Sr., Capatora Z. Wilson, Christopher G. Wilson, Earnest B. Wilson, Sheila R. Wilson, Dexter Yarbrough, Karen Yates, Alvin Amos, Joe E Barnes, Jr., Mae E Bodie, Jeffrey Booker, Kevine Brice, Arthur D Browder, Deborah E Brown, Gina L Chandler, Terrie A Cook, Aaron Cotton, Jr, Lenwood L Cross, Juanita B Dawson, Thomas Evans, Jr, Viveka J Ferrell, Tessa M Gaines, Eddie E Garrett, Gus A Harvey, Jr, Lynette S Helm, William M Wilbring, Patricia A Hill, Darlene J Hudson, Lorry Jenkins, Benjamin Jones, Eddie Jones, Andrew Jones, Jr, Louise Jones-Wilson, Cynthia E Lance, Horace C Mackey, Jr, Charles T Martin, Patricia M Merriweather, Jeane A Moore, Joanne Moore, Donnie R Parnell, Kenneth L Perry, Elois Raggs, David K Readus, Will D Redmond, Robert W Rooker, III, Debra J Rounds, Freddia A Simmons, Christopher P Suber, Raymond J Sykes, Daniel G Trevino, Myrna L Turner, Willie Wallington, Jr, Gerald E Wesley, and Gregory White.

Respondent is the City of Chicago.

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PETITION FOR WRIT OF CERTIORARI

Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 16, 2006.

OPINIONS BELOW

The majority (App. 1-13) and dissenting opinions (App. 14-16) of the Court of Appeals are reported at 469 F.3d 609. The opinion of the district court (App. 19-25) is unreported. The opinion of the Court of Appeals upholding the denial of a preliminary injunction (App. 26-34) is reported at 135 F.3d 1150 (7th Cir. 1998).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 17) was entered on November 16, 2006. Rehearing was denied on December 14, 2006. (App. 18.)

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1. Petitioners, 336 present and former Chicago police officers, are identified by name in the list of parties *ante*.

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. §2000e-2(k)(1)(A) and §2000e-2(k)(1)(C) which provide as follows:

Sec. 2000e-2. Unlawful employment practices

***

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if —

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

* * *

(1)(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

STATEMENT

From 1994 through 1997, the City of Chicago used scores from a written test to made promotions to the position of sergeant in its police department. The test had an significant disparate impact upon non-white officers: although African-American and Hispanic officers made up about 43% of those who took the test, only 12% of the more than 400 promotions went to minorities.

Petitioners, a group of African-American and Hispanic Chicago police officers, filed suit in the district court under Title VII of the Civil Rights Act of 1964 to challenge the disparate impact of the test. The district court denied petitioner's application for a preliminary injunction. During the pendency of an appeal from that order, respondent appointed a "Blue Ribbon Task Force" to review its promotion procedures (Appendix 28), and agreed to hold off on further promotions if plaintiffs asked the court of appeals to stay the appeal while the review was underway. The court of appeals granted this request on April 2, 1996. (Appendix 29.)

The "Blue Ribbon Task Force" recommended that a merit selection element be included in the promotion process. (Appendix 29.) The committee made the specific recommendation that 30% of all promotions should be made irrespective of test scores on the basis of merit. Id. Respondent declined to immediately implement this recommendation (Appendix 4), and on February 22, 1997, made 75 promotions to sergeant on the basis of test scores. Minority officers comprised 12% of those promoted.

Respondent offered a new promotional test in 1998 and used a merit selection system to make 30% of those promotions. While the promotions made from the test scores continued to have a disparate impact on minorities, there was no discrimination in the merit promotions. (Appendix 8.)

After a written test identical to that used in this case had been upheld in other litigation,[2] petitioners limited their claim to whether "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" in accordance with *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975) Specifically, petitioners argued that supplementing test score promotions with merit promotions, as had been recommended by the "Blue Ribbon Task Force," would have had a less discriminatory impact than making all promotions from test scores. The district court resolved this issue in favor of respondent on its motion for summary judgment. (Appendix 24-25.)

On appeal, the Seventh Circuit held that petitioners had demonstrated that merit promotions would have been less discriminatory than test score promotions. (App. 8-9.) In the view of the panel majority, however, in order to defeat summary judgment, petitioners

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2. *Brown v. City of Chicago,* 8 F.Supp.2d 1095 (N.D.Ill. 1998), *aff'd sub. nom. Bryant v. City of Chicago,* 200 F.3d 1092 (7th Cir. 2000).

were also required to show that there had been a "method for promoting sergeants that Chicago 'refuse[d] to adopt' and apply in 1997." (Appendix 11.) Judge Williams disagreed with this legal standard, noting that respondent had required only eight days to implement a merit selection process for lieutenant promotions, (Appendix 15), and concluding that petitioners had come forward with enough evidence to warrant a trial on whether respondent "could have used the 30% merit promotions proposal." (Appendix 14.)

REASONS FOR GRANTING THE WRIT

This case raises an important and recurring question about the burden of proof in disparate impact cases arising under Title VII of the Civil Rights Act of 1964 which involve the concept of an "alternative employment practice." Certiorari should be granted to resolve this question which has divided the Courts of Appeals.

The Court recognized the concept of "alternative employment practice" in *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). There, in considering the situation after an employer has proved that its test is "job related," the Court held that the employee may prevail by showing "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" Id. at at 425 (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 801 (1973)). The Court reaffirmed this standard in *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) and *Connecticut v. Teal,* 457 U.S. 440, 447 (1982).

Congress incorporated the *Albemarle Paper* standard in the 1991 amendments to Title VII. 42 U.S.C. §2000e-2(k)(1)(A) expressly includes the "equally valid, less discriminatory alternative" standard, and 42 U.S.C. §2000e-2(k)(1)(C) specifically refers to "the law as it existed on June 4, 1989" as defining the standard for "alternative employment practice."

The Court of Appeals in this case found that petitioners had demonstrated that supplementing test score promotions with merit promotions would have had a less discriminatory impact than making all promotions on the basis of test scores. (App. 6, 14.) Under the standard applied in the Fifth Circuit, this finding would have entitled petitioners to the entry of judgment in their favor because they had come forward with a "meaningful showing of acceptable alternative employment practice." *Albemarle IBEW v. Mississippi Power & Light Co.*, 442 F.3d 313, 319 (5th Cir. 2006). The same result would have been achieved in the Eighth, Ninth, and Eleventh Circuits.[3] The Seventh Circuit,

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3. *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 797 (8th Cir. 1993) (show "lack of an effective alternative policy that would not produce disparate impact"); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1383 (9th Cir. 1979) (less discriminatory alternatives need only "serve the legitimate interests of the police in safe and efficient job performance); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (plaintiff required to show "that there exist alternative policies with lesser discriminatory effects that would be comparable as effective at serving the employer's identified business needs").

though, requires more than the *Albemarle Paper Co.* standard: as the dissenting judge in the court of appeals noted, the standard adopted by the Seventh Circuit requires that the employees meet the impossible burden of showing that their less discriminatory alternative has been "validated under the methods that were ultimately employed by the [employer]." (App. 14, Williams, J., dissenting). The Court should resolve this conflict.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

March, 2007

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604
(312) 427-3200
Attorney for Petitioners

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-4145, 05-4150

EDWARD ADAMS, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois
No. 94 C 5727 —**John A. Nordberg** *Judge.*

Argued June 1, 2006 — Decided November 16, 2006

Before FLAUM, Chief Judge, and MANION and WILLIAMS, Circuit Judges.

MANION, Circuit Judge. Minority Chicago police officers sued the City of Chicago, claiming that a 1994 examination for promotion to sergeant, and the ensuing February 1997 promotions based on that examination, had a disparate impact that discriminated based on race. The district court granted summary judgment to Chicago, determining that the police officers could not demonstrate the availability of an alternative method of promotion that was equally valid and less discriminatory than the examination used. We affirm.

I.

Chicago employs approximately 10,000 sworn law enforcement officials, including 8,000 police officers and

1,200 sergeants. Sergeants supervise the officers, and lieutenants, in turn, supervise the sergeants. Chicago's methods for promoting officers up these ranks has proven to be a contentious issue that has spawned litigation over the past several decades.[1] Responding to the continuing controversy over promotions, Chicago's mayor appointed a panel in 1990 to make recommendations concerning future promotions. Based on those recommendations, Chicago hired an outside consultant to create a promotional examination. In the present suit, black and Hispanic officers

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1. *See, e.g., Banos v. City of Chicago,* 398 F.3d 889, 890 (7th Cir. 2005) (minority sergeants challenged 1998 promotions to lieutenant); *Allen v. City of Chicago,* 351 F.3d 306, 307 (7th Cir. 2003) (minority officers challenged 1998 promotions to sergeant); *Barnhill v. City of Chicago,* 142 F. Supp. 2d 948, 950 (N.D. Ill. 2001) (white male officers challenged 1998 promotions to sergeant); *Bryant v. City of Chicago,* 200 F.3d 1092, 1094 (7th Cir. 2000) (minority sergeants challenged 1994 promotions to lieutenant); *Deveraux v. City of Chicago,* 14 F.3d 328, 331 (7th Cir. 1994) (sergeants and lieutenants challenged Chicago's retiring of previous promotional roster); *United States v. City of Chicago,* 870 F.2d 1256, 1257-58 (7th Cir. 1989) (white female sergeants challenged 1988 promotions to lieutenant); *Bigby v. City of Chicago,* 766 F.2d 1053, 1055 (7th Cir. 1985) (minority and white sergeants challenged 1977 promotional exam for lieutenant promotions); *United States v. City of Chicago,* 411 F. Supp. 218, 224 (N.D. Ill. 1976) (minorities and women challenged the 1971 exam for promotion to sergeant), *aff'd in part,* 549 F.2d 415 (7th Cir. 1977).

challenge the resulting 1994 examination used to promote officers to sergeants and the promotions made based on the examination scores. The promotional examination consisted of three parts, which we described in a previous opinion:

> Part I contained multiple-choice questions covering the law, department procedures, and other regulations sergeants needed to know. Part II (also multiple-choice) tested the administrative functions performed by sergeants, including reviewing reports and determining crime patterns. Candidates who did well on Parts I and II were presumed to know the fundamentals and were then given the opportunity to take the third part of the test, an oral examination based on a written briefing.

Adams v. City of Chicago, 135 F.3d 1150, 1152 (7th Cir. 1998).

Each of the three parts was weighted equally and the scores ranked. The ranking generated a promotional list, with the highest score listed first and entitled to the first promotion. The parties agree that this examination and ranking had a disparate impact on minorities. Chicago made promotions to sergeant based on this ranking in August 1994, March 1996, and, relevant here, on February 22, 1997, before retiring the promotional list. Earlier in these proceedings, the officers sought an injunction to prohibit Chicago from making further sergeant promotions, which the district court denied and we affirmed. Id.

As the litigation continued, the mayor appointed a task force to make recommendations for the promotional process. The task force issued its report on January 16, 1997, which included a recommendation that, in the future, thirty percent of promotions to sergeant be based upon merit, with the promotional tests used to assure "a minimum level of competence." *Adams,* 135 F.3d at 1153. Merit refers to

the officers' on-the-job performance, as rated by their supervisors. Merit does not necessarily correlate with performance on the examination. Chicago did not follow this recommendation in making its February 22, 1997 promotions just over one month later.

Chicago administered its first written examination for police officers over a century ago in 1894. It did not make promotions from officer to sergeant based on merit until after the task force's recommendations in 1998. Nonetheless, the officers submit that Chicago could have and should have instituted a merit component for promoting officers to sergeants. The officers point out that, beginning in 1989, the City used merit to fill twenty percent of D-2 positions. D-2 positions retain the rank of police officers, but function as detectives, youth officers, and gang crimes specialists. Furthermore, the officers note that pursuant to the task force's recommendations, Chicago made thirty percent of its promotions from officer to sergeant and from sergeant to lieutenant based on merit beginning in 1998. Since Chicago considered merit in appointing D-2 positions and lieutenants, and since the panel recommended merit considerations for prospective sergeant promotions, the officers argue that Chicago could have used merit in making thirty percent of the promotions to sergeants in 1997. They claim that this consideration would have been an equally valid, less discriminatory method of promotion and that Chicago's failure to consider merit therefore violated Title VII.

Faced with these claims in a well-trodden field of litigation, the district court excluded evidence of Chicago's promotional process for promotions made after 1997, reasoning that the evidence was irrelevant and inadmissible as a subsequent remedial measure. Without this evidence, the district court then determined that the officers could not demonstrate that considering merit was a method that was

available to Chicago in 1994 or that the consideration of merit would result in equally valid, less discriminatory promotions. Accordingly, the district court granted summary judgment to Chicago. The officers appeal.

II.

We review de novo the district court's grant of Chicago's motion for summary judgment, viewing the facts and drawing inferences in the light most favorable to the police officers, who are the non-moving parties. *Allen,* 351 F.3d at 311. At the outset, we address the district court's exclusion of evidence of the 1998 promotions, which provided that thirty percent of the promotions be based on merit. Since "decisions regarding the admission and exclusion of evidence are peculiarly within the competence of the district court," we review the district court's "rulings on motions in limine for an abuse of discretion." *Heft v. Moore,* 351 F.3d 278, 283-84 (7th Cir. 2003) (internal quotation and citation omitted). As noted, the district court reasoned that the later promotions to a different rank were irrelevant to determining the available methods for sergeant promotions in 1994, and also analogized the changes in promotional methods to subsequent remedial measures that should be excluded under Federal Rule of Evidence 407. The officers contest these rulings on appeal.

Rule 407 provides that "[w]hen, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." We have previously noted that "[t]he purpose of Rule 407 is to promote safety by removing the disincentive to take post-accident safety measures that would exist if the accident victim could introduce evidence of these measures on the issue of the defendant's

liability." *Probus v. K-Mart Inc.*, 794 F.2d 1207, 1210 (7th Cir. 1986) (citing *Pub. Serv. Co. v. Bath Iron Works Corp.*, 773 F.2d 783, 791 (7th Cir. 1985); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 469 (7th Cir. 1984)). The plain language of this rule does not readily apply to disparate impact claims, which are not naturally described as "an injury or harm allegedly caused by an event." Even if we were to apply Rule 407, our analysis of this disparate impact claim requires us to address the availability of an alternative promotional method, as will be discussed below. A subsequently enacted method bears on the availability of the alternative method at an earlier time. Because we must discuss the availability of an alternative method, this situation falls within the ambit of the exception contained in Rule 407, which explicitly "does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving . . . feasibility of precautionary measures." Since another purpose is at issue here, Rule 407 is an improper basis for the exclusion of the 1998 promotional method.

The district court also excluded this evidence based on relevancy, concluding that "evidence of [the City's] promotion practices well after the promotions at issue is irrelevant to the issue of what information/alternatives were available when the disputed promotions were made." In addressing hiring practices, the Sixth Circuit has explained that "in proving the existence of a viable alternative hiring procedure, the court should consider evidence that the plaintiff might introduce on a variety of factors. Certainly any subsequent practices adopted by the company would be relevant." *Chrisner v. Complete Auto Trans., Inc.*, 645 F.2d 1251, 1263 (6th Cir. 1981). We agree that evidence of subsequent procedures may be relevant to proving the availability of a procedure at an earlier time. Consequently, the district court abused its discretion in excluding this evidence. Even considering this evidence, however,

the officers fail to show that Chicago had an opportunity to adopt an alternative available method for evaluating the merit of officers seeking promotion to sergeants before the promotions were made in 1997.

As we have previously held, in order "[t]o succeed on a disparate impact claim, plaintiffs bear the burden of showing that a particular employment practice causes a disparate impact on the basis of race." *Allen*, 351 F.3d at 311. Chicago concedes that the 1994 promotional examination, the employment practice at issue, had a disparate impact on minority officers. Having established the disparate impact, "the burden shifts to the City to demonstrate that the promotion process is 'job related' and 'consistent with business necessity.'" *Banos*, 398 F.3d at 892 (citing 42 U.S.C. §2000e-2(k)(1)(A); *Allen*, 351 F.3d at 311). The officers concede that the examination was job related and consistent with business necessity in the wake of *Bryant*, 200 F.3d at 1094, which validated a similarly constructed examination for promotions from sergeant to lieutenant. Thus, "the burden shifts back to the plaintiff to prove that there was another available method of evaluation which was equally valid and less discriminatory that the employer refused to use." *Bryant*, 200 F.3d at 1094 (citing 42 U.S.C. §2000e-2(k)(1)(A)(ii); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

We therefore consider whether the officers meet this burden. The officers propose as an alternative that Chicago could have made thirty percent of the 1997 promotions based on merit. To succeed with this claim, this alternative "must be available, equally valid and less discriminatory." *Allen*, 351 F.3d at 312 (citing *Bryant*, 200 F.3d at 1094). Thus, to prevail, the officers must show that making the thirty percent of the promotions to sergeant based on merit "would be of substantially equal validity" as promotions based solely on the 1994 sergeant examination, and that

including such merit promotions "would be less discriminatory than" use of the examination alone. Id. In other words, "the officers effectively bear the burden of establishing that the last officer promoted [in the proposed] merit-based selection process would be roughly as qualified as the officer with the [ ] lowest score on the" 1994 examination who was slated to be promoted. Id. (citing *Albemarle,* 422 U.S. at 425; *Bryant,* 200 F.3d at 1094). Most critical to this case, "the statutory scheme requires plaintiffs to demonstrate a viable alternative and give the employer an opportunity to adopt it." Id. at 313 (citing 42 U.S.C. §2000e-2(k)(1)(A)). Disparate impact, then, requires the officers to demonstrate that Chicago "refuse[d] to adopt such alternative employment practice." 42 U.S.C. §2000e-2(k)(1)(A)(ii).

In subsequent litigation related to the 1998 promotional examination, Chicago agreed "that merit-based promotions at the thirty percent level are of substantial equal validity as assessment-based promotions." *Allen,* 351 F.3d at 313 (citations omitted). Even if we were to apply this concession in this case, the officers have not shown that a process for evaluating officers on their merit for promotions to sergeant was available in 1997 or that Chicago refused to adopt this alternative earlier.[2] Without an available method

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2. We agree with Judge Williams' statement that "[a] reasonable alternative is not unavailable simply because the defendant has not completed its own inquiry into the viability of the alternative." (Williams, J., dissenting post at 16.) As the remainder of this opinion explains, however, after a thorough search, we find the record to be devoid of evidence that the City could have feasibly developed and applied a valid merit selection method for promotions to sergeant during the month between the recommendation of merit selection and the

for Chicago to adopt, the officers' claims fail. We will explain.

No procedure for evaluating the merit of potential sergeants existed at the time of the contested 1997 promotions.[3] In fact, when the consultant created the 1994 examination, on which the 1997 promotions were based, Chicago had never considered merit for promotions to sergeant in the 100 years after written exams were instituted for the police officers. The parties also agreed that as of February 22, 1997, the date of the contested promotions, "the City had never developed, and had never had developed for it, a mechanism or procedure for merit promotions to the rank of police sergeant that had ever been validated." The lack of a validated procedure is significant, since, as the expert who created the examination testified, it is difficult to obtain objective, reliable merit ratings from supervisors in a litigious climate where "they may be accused of favoritism, bias, perhaps even discrimination" based on the ratings.

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promotions at issue. This remains plaintiffs' burden to demonstrate.

3. The vice chairman of the mayor's 1990 panel testified that, before the creation of the 1994 examination at issue, the minority police officer organizations expressed "a great distrust of any subjective components of test processes, including any reliance on performance evaluations." In accordance with this submission, the panel recommended the creation of an examination by outside consultants over a defined set of materials, without merit consideration.

The subsequent January 16, 1997, task force report did recommend the use of merit in future promotions to sergeant, perhaps in part due to the undisputed disparate impact of the 1994 examination. This recommendation, however, was prospective, noting that "the criteria for merit promotions should be developed by the Superintendent and broadly distributed." After receiving the recommendation, Chicago hired another expert to develop a new promotional examination and an appropriate merit selection procedure. The expert spent months performing a job analysis of the sergeant position and developed criteria for merit selection based on an analysis of the skills necessary to the position. The resulting merit selection process involved the training of select nominators, who were then held accountable for the accuracy of their nominations, and the further review of the nominees by the Academic Selection Board and the Superintendent of the Chicago Police Department. Allen, 351 F.3d at 309-10. This process, from recommendation through implementation, spanned about nineteen months. Merit was then used in making the August 1998 sergeant promotions. To demonstrate that merit should have been used in the 1997 sergeant promotions, the officers bear the burden of demonstrating that a valid merit selection process was available on February 22, 1997, only one month after the task force recommended considering merit and before the development of appropriate criteria and process, and that Chicago refused to adopt it. 42 U.S.C. §2000e-2(k)(1)(A)(ii).

To meet this burden, the officers submit that merit evaluations could have been implemented sooner, since merit was already used in selecting the D-2 positions. The task force did suggest in January 1997 using "the existing merit selection process for detectives as a model" for sergeant promotions. Nothing in the record, however, indicates that the D-2 process could be adopted in toto for sergeants. Both the D-2 and sergeant positions were filled by

police officers. Unlike the D-2 positions, however, the sergeant positions were supervisory. Thus, the merit selection process needed to discern and evaluate supervisory attributes in the non-supervisory rank of officers. Although the D-2 merit promotion process existed in 1997, it does not follow that Chicago had an available, equally valid method for promoting officers to sergeants at that time based on the D-2 procedure. There was no method for promoting sergeants that Chicago "refuse[d] to adopt" and apply in 1997. 42 U.S.C. §2000e-2(k)(1)(A)(ii).

The officers next point to certain promotions from sergeant to lieutenant, which incorporated merit in 1995. Again, the merit promotion process for lieutenants does not demonstrate that a process would be available for sergeants or that Chicago refused to adopt an available alternative method. First of all, unlike evaluating non-supervisory officers for a promotion to a supervisory position, both the sergeant and lieutenant positions are supervisory. Thus, evaluations of sergeants' performance already encompassed the supervisory aspects. The officers have not shown the availability of a merit evaluation process of officers that would evaluate attributes for the sergeant position. Furthermore, the pool of sergeants seeking promotion to lieutenant is significantly smaller than the pool of officers seeking promotion to sergeant. For example, in 1994, 765 sergeants sought promotion to lieutenant, while 4,700 officers sought promotion to sergeant. The officers have not shown that a valid evaluation method was available on this large scale. See *Allen,* 351 F.3d at 313-14 (addressing limitations in merit evaluation when number of candidates for promotion increase). Furthermore, the 1995 promotions to lieutenant were, unsurprisingly, challenged in federal court. *Brown v. City of Chicago,* 19 F. Supp. 2d 890 (N.D. Ill. 1998). In that case, the district court noted that the "criteria and procedures put in place" for making the 1995 merit promotions (which were based on past job

performance) "were abbreviated and, as the parties agree, inferior" to the merit evaluations subsequently used in 1998. Id. at 892. The plaintiffs here do not present evidence that evaluation of officers' past performance or an alternative evaluation method was available or sufficient for ascertaining the merit of potential sergeants, let alone demonstrate that such an inferior method would be equally valid to the rankings from the 1994 examination alone. Thus, the officers have not demonstrated that Chicago refused to adopt an available method for considering merit in making sergeant promotions in 1997. 42 U.S.C. §2000e-2(k)(1)(A)(ii).

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3. Judge Williams emphasizes in her dissent the eight-day period during which the City implemented merit promotions from sergeant to lieutenant (between February 28, 1995 and March 8, 1995). (Williams, J., dissenting, post at 16.) We note that the lieutenant merit promotions were almost immediately enjoined by the Illinois courts for violating state law. *See McArdle v. Rodriguez,* 659 N.E.2d 1356, 1359 (Ill. App. 1995). The injunction was invalidated by federal litigation, but notably not until July 6, 1998, more than 16 months after the promotions to sergeant at issue in this case. *See Brown v. City of Chicago,* 8 F. Supp. 2d 1095, 1111-12 (N.D. Ill. 1998). Of course, a state court injunction is no excuse for violating federal law, but it does indicate that the City did not "refuse[ ] to adopt" an available alternative. 42 U.S.C. §2000e-2(k)(1)(A)(ii). Regardless, the size and scale of the applicant pool and the officers' lack of supervisory experience distinguish the available methods used for promotions to sergeant from the promotions to lieutenant.

In sum, while the officers assert that thirty percent of the promotions to sergeant should be made based on merit, a proposition subsequently adopted by Chicago, the officers have not demonstrated that this method was available in February 1997 or that Chicago refused to adopt an alternative method. As we explained above, "the statutory scheme requires plaintiffs to demonstrate a viable alternative and give the employer an opportunity to adopt it." *Allen*, 351 F.3d at 313 (citing 42 U.S.C. §2000e-2(k)(1)(A)). Simply stated, the plaintiffs have failed to demonstrate that Chicago had an opportunity to adopt and implement the thirty percent merit-based promotional method in a valid, viable manner on or before February 22, 1997. The task force on the issue made its recommendations for merit promotions just about one month before, on January 16, 1997. At the time of the contested sergeant promotions, no process existed for evaluating the merits of officers for promotion to sergeant. Although, in theory, Chicago could have chosen to base thirty percent of the promotions to sergeant on merit, there is no evidence that by 1997 Chicago had developed criteria or a method for examining the merit of officers for promotion to sergeant. Thus, the officers failed to demonstrate the availability of an allegedly viable alternative that Chicago refused to adopt. Furthermore, the officers have not shown that a hastily adopted merit evaluation process would have been of substantially equal validity to the rankings resulting from the 1994 examination.

III.

The officers have not demonstrated that Chicago had an alternative method available to evaluate the merit of potential sergeants, or refused to adopt such a method, by February 22, 1997, the date of the contested promotions. Therefore, their disparate impact claim fails. Accordingly, we AFFIRM the judgment of the district court.

WILLIAMS, Circuit Judge, dissenting. The majority concludes that the plaintiffs failed to demonstrate the existence of a question of material fact because they did not produce evidence that a substantially equally valid alternative was available to the City in 1997, at the time of the contested promotions. But as the majority opinion discusses, the district court abused its discretion in excluding evidence of the City's subsequent success with merit promotions at the sergeant level. *See Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1263 (6th Cir. 1981) ("Certainly any subsequent practices adopted by the company would be relevant" to determination of whether plaintiff could show existence of "an alternative selection device with a disparate impact less than that of the challenged practice."). With this evidence considered, the question of validity is answered. The only question is whether 30% merit promotions were "available" in February of 1997.

The majority opinion seems to conclude that the plaintiffs have not met their burden of demonstrating availability because the plaintiffs never presented the City with a proposal validated under the methods that were ultimately employed by the city. Nothing in the statute, the applicable regulations, or in our caselaw, however, indicates that, under 42 U.S.C. §2000e-2(k)(1)(A)(ii), for an alternative to be available it must have been validated in this manner. At bottom, the relevant question is simply whether there is evidence in the record from which a reasonable jury could conclude that at the time of the contested promotions, the City could have used the 30% merit promotions proposal. The answer to this question is "yes." Regardless of whether the process of formulating a promotional process for sergeants was more complex than that for either D-2 or lieutenant promotions, the fact that the City had successfully implemented essentially the same system for these ranks is powerful evidence that the alternative was available for sergeant promotions and the City refused to adopt

it.

At the very least, a question of material fact remains as to whether the pace and nature of the City's investigation into the possibility of using 30% merit promotions for sergeants was reasonable. This is underscored by the timeline of this case--as the majority opinion describes, the City's Task Force recommended the use of the 30% merit promotions proposal more than one month before the promotions in question. In contrast, it took the City only eight days to move from the Task Force's recommendation to implementation when the City examined its system for promoting lieutenants. There is a logical disconnect between the idea that the City's own task force had recommended use of this system and the majority's conclusion that this alternative was unavailable more than one month later. The explanation for this disconnect is that the majority has unnecessarily complicated the question of availability. An alternative is unavailable when, for verifiable reasons, the defendant cannot adopt it. A reasonable alternative is not unavailable simply because the defendant has not completed its own inquiry into the viability of the alternative.

A true situation of no viable alternative being available can be found in the Eleventh Circuit's decision in Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993). In Fitzpatrick, black firefighters challenged an Atlanta Fire Department rule that required them to be clean shaven because of the racially discriminatory impact of this rule. See id. at 1114 ("The twelve plaintiff-appellant firefighters in this case are all African-American men who suffer from pseudofolliculitis barbae ('PFB'), a bacterial disorder which causes men's faces to become infected if they shave them. It is generally recognized that PFB disproportionately afflicts African-American men."). The firefighters proposed that "shadow beards" would constitute a less-discriminatory alternative with equal safety value, but the Eleventh Circuit

concluded that the firefighter plaintiffs had failed to introduce sufficient evidence to raise an issue of material fact where the City had submitted voluminous evidence of the safety-necessity of its no-beard policy. See id. at 1122-23. This case is not like Fitzpatrick, where a less-discriminatory alternative literally did not exist for scientifically verifiable reasons. Similarly, the Second Circuit has observed that in housing disparate impact cases, the question of whether a proposed alternative is available should be determined by objective factors such as cost. See *Hack v. President and Fellows of Yale College,* 237 F.3d 81, 101 (2d Cir. 2000) ("Factors such as the cost or other burdens of the proposed policy are relevant to a determination as to whether the defendant's refusal to adopt an alternative housing procedure was reasonable."), abrogated on other grounds by *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002).

An alternative was available here. There is a question of material fact as to whether the City took proper steps in assessing its viability and in promptly implementing it. While the City's timing may have been perfectly reasonable in this case, this was a question for trial. By deferring to the defendant's calculation of the time needed to implement an equally valid alternative, our decision invites abuse by defendants acting in bad faith. I therefore respectfully dissent from the majority's affirmance of the grant of summary judgment.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-4145, 05-4150

EDWARD ADAMS, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois
No. 94 C 5727 —**John A. Nordberg** *Judge.*

[November 16, 2006]

JUDGMENT — ORAL ARGUMENT

Honorable Joel M. Flaum, Chief Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Ann C. Williams, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-4145

EDWARD ADAMS, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois
No. 94 C 5727 —**John A. Nordberg** *Judge.*

[December 14, 2006]

ORDER

Honorable Joel M. Flaum, Chief Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Ann C. Williams, Circuit Judge

On consideration of the petition for rehearing en banc filed by plaintiffs-appellants, no judge in active service has requested a vote on the petition for rehearing en banc,[1] and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

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1. Judge Rovner did not participate in the consideration of this petition

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Adams, et al.,	)	
	)	
Plaintiffs,	)	
-vs-	)	No. 94 CV 5727
City of Chicago,	)	*(Judge Nordberg)*
	)	
Defendant.	)	

ORDER

Before the court is the City's motion for summary judgment. This case involves a challenge to the 1994 promotional examination that was used to promote 75 police officers to the rank of sergeant in February 1997. For details and background of this case, see this Court's lengthy opinion denying plaintiffs' motion for a preliminary injunction in *Adams v. City of Chicago,* 1996 WL 137660 (N.D. Ill. Mar. 25, 1996). This case is one of several similar cases that were brought by the attorneys representing plaintiffs here. These attorneys and the City and its attorneys are thus thoroughly familiar with the facts, history, and results of these series of cases. And the Seventh Circuit also has now addressed these general issues several times. *See Banos v. City of Chicago,* 398 F.3d 889 (7th Cir. 2005); *Allen v. City of Chicago,* 351 F.3d 306 (7th Cir. 2003); *Bryant v. City of Chicago,* 200 F.3d 1092 (7th Cir. 2000).

As the parties agree, the sole issue now before the Court is whether plaintiffs can meet their burden of showing that there existed a (i) substantially equally

valid and (ii) less discriminatory alternative method to the one used by the City in 1994 to make sergeant promotions and (iii) whether this method was then available to the City. In its opening brief, the City argued that plaintiffs had failed to offer any specific proof to support their claim that a merit-based selection process met these three requirements.

In their response brief, plaintiffs argued that the merit process was a valid, less discriminatory alternative because the City had used it in some other cases — specifically in promoting officers to the D-2 detective position, which was litigated in *Barnhill,* and in promoting 13 sergeants to lieutenant in 1995, which was litigated in *Bryant.* (Resp. at 3-5, 10-13.) Plaintiffs also argued that the City's decision to use a merit selection process for part of the 1998 promotions, which was litigated in *Allen,* demonstrates that it could have used this method in the earlier promotions. Plaintiffs finally relied on the general claim that the City has acknowledged that having minorities in command positions provides various positive benefits.

In its reply, the City reiterated that plaintiffs still had not come forward with any concrete evidence. Specifically, the City pointed to the following undisputed facts, which were true as of the time of the February 1997 promotions: (i) the City had never before (in that century) used merit selection for promotion to sergeant; (ii) no such merit selection method for sergeant had been developed or validated; (iii) no evidence was submitted to show that a method of merit selection was valid for sergeant promotions; and (iv) no evidence had been presented to establish the racial impact that such a method would have had on sergeant

promotions made at that time. (Reply at 1-2.) In addition to pointing plaintiffs' failure to offer any concrete proof, the City also addressed the plaintiffs' more general arguments. As for the general need for diversity in the command structure, the City asserted that this point was true and undisputed but irrelevant to the specific question at hand. As for the various other instances in which the City used a merit selection process in some part, the City noted that those situations were different and could not be used to establish the requisite proof with regard to these promotions. With regard to the D-2 promotions, the City asserted that a "crucial distinction" exists because sergeant promotions are to a higher rank and because sergeants perform supervisory functions whereas the position of D-2 detective is not a supervisory position. Therefore, decisionmakers do not need to consider supervisory abilities for the D-2 promotions. (Id. at 6.) With regard to the promotions from sergeant to lieutenant at issue in *Bryant,* the City maintains that this situation is also different. This is because it is easier to use a merit selection process for these other promotions given the undisputed facts that lieutenants are elevated from a pool of supervisors (sergeants) while sergeants are selected from a pool of non-supervisors (police officers). (Id. at 9.) Therefore, the decisionmakers selecting such candidates for promotion to lieutenant would have observed the candidates performing supervisory functions. (Id.) As for the use of a merit selection process in *Allen,* the City first argues (correctly) that this Court already ruled on May 30, 2002 that this evidence of an employer's subsequent attempts to improve a situation should not be considered for policy reasons. The City also argues that these merit

promotions came only after a year-long process in which the City went through a lengthy process of hiring a test developer and analyzing various information in detail, which is a process that had not been undertaken at the time of the promotions in this case. (Id. at 4.) The City finally notes that, after February 1997, the results of the 1994 examination were never again used to make a promotion to the rank of sergeant. Therefore, the practice challenged in this case was discontinued by the City.

After the parties completed their initial briefing in this case, the Seventh Circuit issued its ruling in *Allen v. City of Chicago,* in which it affirmed summary judgment for the City and rejected the plaintiffs' argument that the City should have used a merit selection process in the 1998 sergeant promotion process for (i) more than the 30% of the applicants who were promoted by merit selection process after first passing a written qualifying test and for (ii) some portion of those applicants who did not pass the written qualifying test. 351 F.3d at 308. The Seventh Circuit emphasized that plaintiffs had the burden of proof and had to come forward with specific evidence and rejected the plaintiffs' argument that they "should not be required to come forward with evidence to show a correlation between their alternative procedure and job performance." Id. at 314. The Seventh Circuit also rejected plaintiffs' attempt to meet their burden of proof by pointing to the City's use of a merit selection process in "other litigation." Id. at 313. Noting various differences in the way a merit selection process works in specific contexts and also noting that "performance-based selection systems have recognized

limitations," the Seventh Circuit held that the plaintiffs must "separately show" the validity of the merit-selection process at issue in the case. Id. at 313-14. The Court was careful to point out that, simply because merit selection had been used with success on some prior occasion, was not sufficient to "establish" that it would work in other contexts. Id. at 315. In sum, the Seventh Circuit concluded that the plaintiffs' arguments were based on "mere speculation" and "bare assertions." Id. at 315, 317.

Soon after *Allen* was issued, the City filed a motion bringing this case to the attention of this Court and argued that it mandated a similar result here. Plaintiffs did not respond to this motion or otherwise seek to rebut *Allen* but instead, two months later, filed a motion seeking to amend their responses to requests to admit in which they asked to take back their admission that the 1994 written test was job-related, content valid, and consistent with business necessity. This Court denied the motion, finding that plaintiffs' request to change its position was made too late in the litigation and would prejudice the City, which had relied on these admissions in bringing its summary judgment motion. See 5/24/04 Order.

On April 12, 2005, the City filed another motion to present supplemental authority to the attention of this Court. Specifically, the City pointed to the Seventh Circuit's recent decision in *Banos v. City of Chicago,* which involved a challenge to the City's 1998 lieutenant examination. 398 F.3d at 890. Relying on *Allen,* the Seventh Circuit affirmed summary judgment in favor of the City. During the course of that litigation, the *Banos* plaintiffs (represented by the same

attorneys representing these plaintiffs) initially admitted the validity of the written examination. But then, after *Allen* was issued, they — according to the Seventh Circuit — "tried to flip-flop by withdrawing their earlier admissions. Id. at 892. They did so because they acknowledge that "*Allen* is fatal to any equally valid, less discriminatory alternative' argument." Id. The Seventh Circuit held that the district court did not abuse its discretion in refusing to allow the plaintiffs to take back their admissions. The Seventh Circuit concluded with this observation: "Throughout this litigation, the City has been subjected to long delays and voluminous discovery. Enough is enough." Id. at 893.

Having carefully considered the parties' briefs, as well as the relevant case law, we find that plaintiffs here likewise cannot meet their burden of demonstrating that a merit selection procedure would have been substantially equally valid and less discriminatory and that it was available in 1994. There are no real factual disputes. Plaintiffs cannot meet their burden because they essentially rely on the method of proof that was rejected in *Allen*. Specifically, as described above, the Seventh Circuit made clear that context is important and that it is not enough to point to the general use of a merit selection process in some other cases. As summarized above, the City in its opening and reply briefs has pointed to several salient differences between this case and the other cases relied upon by plaintiffs. Beyond pointing to these other cases and to the general notion that diversity in command structure is a recognized positive good, the plaintiffs have no evidence. This conclusion — that *Allen* dooms plaintiffs' claims here — is also indirectly confirmed by plaintiffs'

actions. As noted above, soon after *Allen* was issued, they attempted (similar to the *Banos* plaintiffs) to change their litigation strategy because "it became apparent that [they] could not win." *Banos,* 398 F.3d at 893. For the and the other reasons stated in the City's opening and reply briefs, we grant summary judgment to the City.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1708, 97-1611

PEGGY ADAMS, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois
No. 94 C 5727 —**John A. Nordberg** *Judge.*

Argued October 30, 1997 — Decided February 4, 1998

Before CUDAHY, COFFEY, and MANION, Circuit Judges.

MANION, Circuit Judge. Approximately 280 minority Chicago police officers claim that a test administered to determine promotions to sergeant is racially biased. They appeal the district court's denial of their request for a preliminary injunction which would have prohibited the City from making sergeant promotions pending the outcome of their suit. Because the plaintiffs cannot demonstrate irreparable harm, we affirm.

I.

The Chicago Police Department (Department) employs close to 10,000 police officers from entry-level to the highest ranks. This huge Department is structured with a typical chain of command where higher-ranking officers

supervise those in the ranks below. This case is about sergeants and how they are promoted. The issue is not new. The Department's hiring and promotion practices have been challenged in federal court several times. *See, e.g., Deveraux v. City of Chicago,* 14 F.3d 328 (7th Cir. 1994) (challenging lieutenant and sergeant promotions); *Auriemma v. Rice,* 957 F.2d 397 (7th Cir. 1992) (demotions alleged to be racially motivated); *United States v. City of Chicago,* 870 F.2d 1256 (1989) (challenging lieutenant promotions); and *Bigby v. City of Chicago,* 766 F.2d 1053 (7th Cir. 1985) (same).

The Department is structured to employ over a thousand sergeants. When the plaintiffs sought a preliminary injunction in the district court to prevent further promotions, the Department had approximately 230 sergeant positions to fill. Also, the Department expected to promote 42 sergeants to lieutenant, which would create additional vacancies in the sergeant rank. In any given month retirement, attrition, and death typically caused several additional vacancies. Thus many sergeant slots were vacant. In fact, during the last three weeks of December 1995 and the first week of January 1996, the Department should have staffed 3,444 tours, or shifts of duty, with sergeants, but due to the vacancies 1,600 tours went without sergeants. Even with all of these slots available, the Department has been unable to fill them without a fight over who gets promoted.

In 1993, in an attempt to arrive at a fairer system, the City of Chicago designed and administered a three-part test to determine who gets promoted to sergeant. Part I contained multiple-choice questions covering the law, department procedures, and other regulations sergeants needed to know. Part II (also multiple-choice) tested the administrative functions performed by sergeants, including reviewing reports and determining crime patterns. Candidates who did well on Parts I and II were presumed to know the

fundamentals and were then given the opportunity to take the third part of the test, an oral examination based on a written briefing.

Before administering the test, the Department announced that promotions would be based exclusively on the test, and would be made in "rank order," i.e., the highest scorer on the test would be promoted first, the tenth highest tenth, and so on. Parts I and II were administered to 4700 sergeant candidates, and of that number 1,900 candidates qualified for and were given oral examinations. Of the original 4,700 who took the exam, 31.8% were black, 10.8% were Hispanic, and 56.4% were white. But after all three parts were graded, about 88% of those designated to be promoted to sergeant were white and 12% were minority.

The Department administered the test in the first three months of 1994. In August 1994, the Department promoted 114 police officers to sergeant. On September 21, 1994, the plaintiffs sued the Department, claiming violations of the Fourteenth Amendment and 42 U.S.C. §§1981 and 1983. They subsequently amended their complaint to allege a violation of Title VII, 42 U.S.C. §2000e. The plaintiffs subsequently withdrew all of their claims but the Title VII claim. On February 6, 1996, they sought a preliminary injunction against the Department, enjoining it from making permanent promotions during the pendency of this litigation.

The district court held a two-week hearing on the motion for preliminary injunction, and in a written opinion issued on March 25, 1996, the district court refused to enter a preliminary injunction. The plaintiffs filed an interlocutory appeal. However, during the pendency of this appeal, the City of Chicago initiated a Blue Ribbon Task Force to review the Department's promotion practices. By consent of the parties, argument on this appeal was delayed

until the Task Force issued its report. In May 1997, the Task Force issued its report recommending that up to 30% of the Department's promotions to sergeant be made on the basis of "merit." This meant that current sergeants and lieutenants would pick 30% of the police officers that would be promoted to sergeant. However, the report also recommends that the current test continue to be used to assure that sergeants given "merit" promotions meet a minimum level of competence. Perhaps that would mean that merit selections would come from the 1,900 that qualified under parts I and II of the current test. In any event, the recommended procedure would be significantly different than the one challenged here.

As the caption indicates, there are two appeals now before this court. Based on the Task Force report, the plaintiffs sought a remand of appeal No. 96-1708 to the district court, to allow the district court to consider the report. We directed the plaintiffs to follow the procedure set forth in Circuit Rule 57.[1]S The plaintiffs asked the district court to state whether it was inclined to change its

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1. Circuit Rule 57 states:

Remands for Revision of Judgment

A party who during the pendency of an appeal has filed a motion under Fed. R. Civ. P. 60(a) or 60(b), Fed. R. Crim. P. 35(b), or any other rule that permits the modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case for the purpose of modifying the judgment. Any party dissatisfied with the judgment as modified must file a fresh notice of appeal.

ruling, and the district court, in a written order, explained that it was not. Consequently that order is the subject matter of appeal No. 97-1611; the defendants have filed a motion to dismiss appeal No. 97-1611 on the grounds that it was not an appealable order.

II.

Initially, we note that because the plaintiffs' original appeal was an appeal from an interlocutory order, Circuit Rule 57 is inapplicable. Circuit Rule 57 applies to motions filed pursuant to "Fed. R. Civ. P. 60(a) or 60(b), Fed. R. Crim. P. 35(b), or any other rule that permits the modification of a final judgment." A denial of a preliminary injunction is not a "final judgment;" appellate jurisdiction is appropriate under 28 U.S.C. §1292(a)(1), not 28 U.S.C. §1291. The correct procedure, as recognized by the district court, would be to file a new motion for preliminary injunction. The plaintiffs would be collaterally estopped from challenging the district court's earlier findings, *Avitia v. Metropolitan Club of Chicago, Inc.*, 924 F.2d 689, 690 (7th Cir. 1991), but they would be allowed to present new evidence. *Red Star Yeast & Products Co. v. La Budde*, 83 F.2d 394, 396 (7th Cir. 1936) ("Denial of an application for a temporary injunction does not prevent another application by the same party in the same suit, if new facts warrant it.").[2]

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2. Because the findings made in the first denial of the motion for preliminary injunction cannot be collaterally attacked, the first appeal is not mooted by the second appeal, and is in fact the sole vehicle for challenging these findings. *See F.W. Kerr Chemical Co. v. Crandall Assoc., Inc.*, 815 F.2d 426, 428-29 (6th Cir. 1987). The findings on the preliminary injunction, however, do not collaterally estop either party from relitigating these issues for purposes of the final judgment. *Gjertsen v.*

Thus, when a preliminary injunction has been appealed and a new motion for preliminary injunction is filed, there is no jurisdictional bar to the district court resolving that motion, or an appeal of the district court's resolution. As a practical matter, the subsequent ruling on the preliminary injunction may moot the earlier ruling on the preliminary injunction. Therefore, staying proceedings before the Court of Appeals, or remanding the earlier decision to the district court, may further the interest of judicial economy. This is the spirit of Circuit Rule 57, which aims at ensuring that the Court of Appeals reviews the last decision of district courts. Unlike under Rule 57, however, a remand is not mandatory. While the plaintiffs failed to file a new motion for preliminary injunction, it probably makes sense in the interest of judicial economy to construe the Circuit Rule 57 procedure followed as the equivalent of the initiation of a new motion for preliminary injunction. *Cf. United States v. Bonansinga*, 855 F.2d 476, 478 (7th Cir. 1988). Although we deny defendant's motion to dismiss Appeal No. 97-1611, this should not be construed as a way to re-route injunctions via a Rule 57 motion. As noted above, we directed the parties to follow the Rule 57 procedure, so we share the responsibility for any confusion resulting from this patchwork process. Henceforth, the Circuit Rule 57 procedure should be used exclusively for final judgments.[3]

Bd. of Election, 751 F.2d 199, 202 (7th Cir. 1984) ("A preliminary injunction has no preclusive effect--no formal effect at all--on the judge's decision whether to issue a permanent injunction.").

3. We do not reach the issue of whether the district court's disinclination to alter its final judgment, pursuant to Circuit Rule 57, is appealable.

Now to the merits: Plaintiffs sought a preliminary injunction prohibiting the Department from making rank order promotions during the pendency of their case. To obtain a preliminary injunction, the movant must establish irreparable harm if the injunction fails to issue, and demonstrate some likelihood of success on the merits. *Abbott Lab. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992). If the district court finds either fact is not present, then the district court's analysis ends and the preliminary injunction should not be issued. Id. When reviewing a denial of a preliminary injunction, "we review the court's findings of facts for clear error, its balancing factors for an abuse of discretion, and its legal conclusions de novo." *Meridian Mut. Ins. Co. v. Meridian Ins. Group Inc.*, 128 F.3d 1111, 1114 (7th Cir. 1997).[4]

After a detailed analysis the district court concluded that the plaintiffs had not demonstrated some likelihood of success on the merits. But given the political volatility on the question of "merit" promotions, this is a close question. The district court also found that the plaintiffs would not be irreparably injured by allowing the Department to make promotions while this litigation is pending. Because we agree with this conclusion, and because this alone precludes the issuing of the preliminary injunction, we need not reach

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4. These appeals would be mooted by either a final decision on the merits by the district court, or the Department's decision not to use the list produced by the test for rank order promotions. The Department has informed us by letter that it is uncertain whether it will make any further promotions off the 1994 promotion list. Thus, at this time the controversy would appear to be live.

the question of the plaintiffs' likelihood of success on the merits.

In most public employment disputes, the district court, after a final hearing, has the authority to order retroactive promotions with back pay, pension benefits, and full seniority rights. *Lasco v. Northern,* 733 F.2d 477, 481 (7th Cir. 1984) ("In the context of public employment, the loss of wages, employee benefits, and opportunities for promotion during a period of suspension do not constitute irreparable injury and do not warrant the granting of a preliminary injunction"); *Rosamata v. United Air Lines, Inc.,* 717 F.2d 1140, 1148 (7th Cir. 1983) (district court may fashion order with presumption of restoring "rightful place seniority rights"); *Brown v. City of Chicago,* 917 F. Supp. 577, 584 (N.D. Ill. 1996). In challenges by police officers regarding promotions, "the court can order their promotion, back pay, pension benefits, and seniority in title." Id. The district court can even order those who have been promoted due to discrimination demoted. *Doll v. Brown,* 75 F.3d 1200, 1205 (7th Cir. 1997). While the district court acknowledged that use of this power can be disruptive, it also found that given the number of current vacancies and the expected attrition of sergeants, no demotions of current sergeants would be needed in order to promote all minorities who should have been made sergeant. In short, "some delay in promotion does not constitute irreparable injury." *Cox v. City of Chicago,* 868 F.2d 217, 223 (7th Cir. 1989); *see also Ceichon v. City of Chicago,* 634 F.2d 1055, 1057 (7th Cir. 1980) (loss of opportunity for promotion does not constitute irreparable injury).

This case is properly distinguishable from *United States v. City of Chicago,* 870 F.2d 1256 (7th Cir. 1989), where we stated that "damages may not be an adequate remedy for persons seeking a career in the Chicago police force who have seen their chances impaired, perhaps

permanently, by the discriminatory promotion of minority sergeants. . Id. at 1262. *United States v. City of Chicago* addressed a conflict between a federal consent decree and another federal case, which arguably prevented the district court from ordering the plaintiffs be promoted, even though prevailing on the merits. This case involves no limiting consent decree, and the district court will be able to make the plaintiffs whole through use of the district court's remedial power, assuming that the plaintiffs prevail after a final hearing. The district court's finding of no irreparable injury is not clearly erroneous. While finding that the plaintiffs would not suffer irreparable harm, the court also concluded that the City, on the other hand, "demonstrated a great degree of irreparable harm to the Chicago Police Department and the public" in the event he granted a preliminary injunction. There is no need to discuss the obvious imbalance between no harm and great harm, but suffice it to say that the district court did not abuse its discretion by denying the preliminary injunction.

III.

This case is one of a series of judicial challenges to the promotion policies and procedures in the huge police department of the City of Chicago. Each new case demonstrates that judicial "solutions" are by no means final. At oral argument attorneys for both sides indicated that the City is indeed giving serious consideration to a merit promotion procedure recommended by the appointed Task Force. Any such resolution achieved in a forum that does not resort to federal court is most welcome. For now we conclude that the district court correctly denied the plaintiffs' motion for preliminary injunction.

AFFIRMED.